IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 103 OF 2001

Vijay Yaman Korde,
No.C-3343,
Nashik Road Central Prison,
Nashik Road, Nashik. .. APPELLANT

VERSUS

The State of Maharashtra .. RESPONDENT

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Shri M.K. Kocharekar, Advocate appointed for the appellant.
Shri A.M.Shringarpure, APP for the respondent State.

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CORAM : N.V.DABHOLKAR
AND
SMT.V.K.TAHILRAMANI,JJ.

DATE : 19TH JANUARY 2006

ORAL JUDGMENT :

(PER DABHOLKAR, J.)

1. The appeal under section 374 (2) of the Code of Criminal Procedure impugnes the judgment and order dated 23.2.2001 delivered by 3rd Additional Sessions Judge, Nasik in Sessions Case No. 2 of 2000. By the said judgment, the appellant / accused was held guilty for offence punishable under section 302 of the

Indian Penal Code and is sentenced rigorous imprisonment for life, fine Rs.1,000/- i/d rigorous imprisonment for three months.

2. Briefly prosecution story can be narrated as under :

. The incident in question is said to have taken place on 5th September 1999 in the early dawn hours at about 5 or 5.30 a.m. The victim Shaila was wife of appellant / accused. The incident took place at Lendipura, Wani, Tq. Dindori, District Nasik. The accused is alleged to have committed murder of his wife by a single blow with an axe on her left side neck extending from front of left ear to beyond the margin of trapezium 12 to 13 cms. in length and oblique in direction. The injury had caused fracture of left mandible near angle, fracture of transverse process of middle three cervicals and fracture of body of middle cervical three vertibra of left side within the wound. The prosecution has tried to put up a story that this was because accused was suspecting character of deceased wife. He was also ill treating her on that count.

3. Prosecution has placed reliance on as

many as ten witnesses out of which PW 8, PW 9 and PW 10 are policemen. Police Constable Deoram Mahale (PW 8) is the carrier who had carried articles for analysis to Forensic Science Laboratory. A.P.I. Gautam Pawar (PW 9) was attached to Wani Police Station at the material time. He had recorded telephonic message about killing of Sau.Shaila. He had also recorded complaint of Bhausaheb (PW 4) (son of the deceased and the accused). He was instrumental to drawing panchanama of the spot, inquest, arrest of the accused and seizure of clothes upon the person of the accused. Thus, he has carried out part of the investigation. The investigation was concluded by Balasaheb Shekahar (PW 10), Dy.S.P., Niphad Division.

. Poornima (PW 3) daughter of the accused and the victim is the star witness. She is examined as an eye witness. At the time of deposition recorded about one year and three months after the incident, she was in 1st standard and, therefore, it can be said that at the time of alleged incident, she was about five and half to six years of age. Bhausaheb Korde (PW 4) is her elder brother, aged about 15 years at the material time. It is his claim that he was woken up by Poornima (PW 3) and informed about killing of mother by their father. His

statement is registered as first information report (Exh.20). Shantaram Korde (PW 6) is real brother of the accused and also his neighbour. He is an important witness. He has provided previous history of the relationship between the couple (victim and the accused) and thus, motive for the offence. He claims to have reached the location upon hearing the shouts of the children. He was the person who first gave telephonic intimation to the police station. It may be stated here itself that the accused and this witness are not only true brothers but they are husbands of true sisters. Deceased Shaila is true sister of wife of Shantaram. Thus, Shantaram and his wife are related to PW 3 and PW 4 from maternal as well as paternal side. Bhaurao (PW 7) is father of the deceased and he speaks about history of relationship between the accused and deceased, prior to the incident.

. Sudhakar Pithe (PW 2) is a panch witness. Spot panchanama (Exh.13), panchanama regarding arrest of the accused and seizure of his clothes (Exh.14) so also memorandum of the statement of accused and discovery of weapon axe at the instance of the accused (Exhs. 15 and 16), all events were witnessed by him. Remaining two witnesses are comparatively of insignificant importance.

Dr. Rohidas Vyavahare (PW 5) had performed post mortem on the dead body and had also clinically examined the accused. As a result of autopsy, he has opined that death of Shaila was caused by shock due to haemorrhage and trauma of cervical spines and cervical cord. He has not noticed any injury upon the person of the accused and he found accused to be physically and mentally a sound person. Defence not having seriously challenged the nature of the death to be homicidal, the medical evidence has remained to be comparatively of lesser importance. Panch witness Pandurang (PW 1) has attended the panchanama under which frock of child witness Poornima produced by her uncle Shantaram, was seized. Neither panchanama (Exh.11) refers to existence of any blood stains on the said frock nor the said frock seems to have been forwarded to forensic science laboratory for analysis. The evidence of this panch witness has, therefore, become irrelevant.

4. The accused has raised a bold defence at least in his statement under section 313 of the Code of Criminal Procedure, 1973. Although no defence evidence is led in order to establish "alibi", impliedly accused has claimed alibi by pleading his absence at the residence (place of occurrence) at the material time.

He has admitted deposition of son Bhausaheb to be correct to the effect that on 4th September 1999, he had approached the shop owner where Bhausaheb was serving and requested for cash Rs.100/- and had accordingly collected the same at about 5 p.m. He admits that he was not present in the house when Shantaram visited. All other details from the prosecution evidence are denied by him.

. In the concluding part of his statement, he has narrated that a piece of land admeasuring 5 acres stands in his name and brother Shantaram desired that it should be mutated in his (Shantaram's) name. For the purpose, Shantaram used to beat him and now he is deposing against the appellant. He also added that he had gone for Darshan of Goddess at 5 p.m. (presumably of 4th September 1999) and returned on the next day at 10 a.m. He noticed a crowd in front of his house and when he proceeded to police station, he was arrested at the police station. Thus, impliedly accused pleads alibi.

5. On reference to impugned judgment, it can be seen that for the reasons discussed in paragraph 10 by referring to nature of injury, as described by the autopsy surgeon, the learned Judge arrived at a

conclusion that the death was homicidal. Instead of beginning with the evidence of eye witness Poornima, learned Judge first considered the evidence of complainant Bhausaheb and that of Shantaram in paragraphs 14 to 17 of the judgment. Finding their evidence to be reliable, the learned Judge concluded that by their evidence prosecution has proved :

(i) Presence of the accused on the night of incident at the residence;

(ii) His absence from the house on the next day morning;

(iii) House was bolted from outside (while children and dead body were inside).

. The learned Judge felt that evidence of these two witnesses was strengthened by immediate reporting to the police. The learned Judge also found evidence of Bhaurao Jadhav (PW 7) - father of the deceased, to be reliable and thus strengthening the prosecution case on the point of motive. So far as child witness Poornima is concerned, after discussing her evidence in paragraphs 19 to 23, the learned Judge concluded

assessment of her evidence thus :-

> "....., it will be somewhat hazardous and risky to place implicit reliance on her testimony."
>
> "Therefore, her testimony can be used only as additional piece of evidence to support the prosecution case. Even otherwise, if her evidence is discarded from altogether and is not taken into consideration at all, in that case also, there are some other circumstances and the direct testimonies of the witnesses discussed above, which can not be ignored and which clinch the guilt of the accused."

. Thus, according to learned Judge, even without taking into consideration the eye witness account as given by Poornima, the prosecution has established guilt against the accused. For the purpose, the learned Judge has felt that mute circumstances have spoken loudly about the guilt of the accused and in the list of these mute circumstances of learned Judge are, discovery of the weapon at the instance of accused, C.A. report showing that blade was stained with human blood of group

"B" (incidently both accused and victim are individuals with blood group "B" but accused has suffered no injury), clothes of accused stained with blood attempted to be washed, door of the house bolted from outside when witness Shantaram arrived and the motive. The learned Judge, therefore, felt that the guilt is proved beyond reasonable doubt.

6. Heard Advocate Shri Kocharekar for the appellant and APP Shri Shringarpure for the respondent State.

. After having taken us through the entire prosecution evidence and even the "reasons" part of the judgment, learned counsel for the appellant has challenged the impugned judgment as under. The evidence of child witness Poornima is tutored evidence and hence is required to be discarded. The prosecution has failed to prove the motive because complainant son Bhausaheb does not speak anything about past conduct of the father towards mother on suspicion against her character. The claim of the prosecution regarding discovery of weapon at the instance of information given by the accused as under section 27 of the Evidence Act, has lost its weight in its totality by admission of panch witness

Sudhakar (PW 2) to the effect :

> "..... at the time of spot panchanama, the axe was found in the house. It is the same axe before the Court."

. According to him, the Trial Court has accepted the evidence in all the panchanamas without properly appreciating the veracity of panch witness Sudhakar. As the last argument, he has pointed out that theory of absence pleaded by the accused is probablised by prosecution evidence itself. Son Bhausaheb has deposed the father having approached his master for lending Rs.100/- and the amount was required for going to Darshan of Goddess. Daughter Poornima has admitted that father had gone for Devi Darshan on the earlier day and accused has maintained the theory even in the statement under section 313 of the Code of Criminal Procedure. Advocate Shri Kocharekar, therefore, claimed that the prosecution has failed to prove the guilt beyond all reasonable doubts and it has at least failed to travel the long distance between "May be true" and "Must be true". The learned APP, during the course of his arguments, has supported the reasons recorded by the Trial Court and urged not to disturb the impugned

judgment and order.

7. Having gone through the impugned judgment, we have not been able to avoid feeling that the learned Trial Judge has not undertaken an exercise of balancing the evidence. The circumstances which apparently support the defence are also required to be taken into consideration together with effect of those on the circumstances and evidence apparently favourable to the prosecution. In doing such balancing, Court is expected to subtract / deduct from the circumstances proved on the basis of material favourable to the prosecution, to the extent circumstances favourable to defence cause adverse effect on the prosecution merits and demand such deduction from credibility of the prosecution story.

. As can be seen from the judgment, direct evidence of Poornima, discovery at the instance of the accused, proof of motive and then evidence of prosecution witnesses Bhausaheb (PW 4) and Shantaram (PW 6) asserting the presence of accused on the fateful night at his residence, are the trump cards in the kitty of the prosecution. Learned counsel for the appellant has tried to assail each of those.

Eye witness - child witness :

8. Let us consider the eye witness account of the incident given by Poornima (PW 3). No doubt, she is daughter of the accused as also daughter of the victim. Ordinarily, one is tempted to question as to why a child should be inclined to depose against the father, even after the mother is lost. At the same time, caution issued by Hon'ble the Apex Court while assessing the evidence of child witness time and again in various judicial pronouncements, can not be ignored and here in this case, we have a child witness who admits to having been tutored by uncle Shantaram and his wife. Poornima, during recording of her evidence, was not
able to tell the name of father and surname. She was studying in first standard when her evidence was recorded in December 2000. She can be presumed to be running 7th year of age at that time. The incident occurred on 5th September 1999 about a year and a quarter prior to recording of evidence and she must be then running 6th year of age. As can be seen from medical evidence, deceased Shaila was slain to death by a single blow with a sharp weapon. It is not the case

where there was a long verbal exchange or struggle during killing of the victim. In fact, nobody knows exact time as to when the blow might have been dealt. We have failed to find any basis to arrive at a conclusion that incident precisely occurred between 5.00 to 5.30 a.m., as stated in the charge framed at Exh.3. The moot question that is required to be answered is whether a child aged about five and half years would wake up at odd night hours in such a fact situation? Would she be witnessing the isolated blow? If natural course of human conduct is the yardstick, the answer should be in the negative.

. During her chief examination, Poornima claimed that quarrel took place between her mother and father. If a quarrel had taken place, there would have been some signs of resistance. On reference to panchanama (Exh.14), the same makes no reference to any injury on the person of the accused and if there was quarrel, there was no reason why Bhausaheb (PW 4), who was comparatively of matured age (15 years), could not have woken up if child of five and half years did wake up. Bhausaheb was sleeping just beyond a door frame and in the adjacent room. On reference to spot panchanama (Exh.13) it is evident that victim was lying in the bed.

If there was a quarrel, it ought to have been followed by violence, struggle and in that case, there could have been even attempt to avoid the blow. Taking into consideration the depth and length of the injury, no such things can possibly be inferred to have occurred. We must say that there are details in the record to look to the statement of Poornima that a quarrel had taken place between her parents, with doubts.

. Following questions-answers recorded in her cross examination may be usefully reproduced :

> "Q. Whether quarrel between your father and mother took place loudly?
> A. Yes.
> Q. Your Nana (PW 6) told that your mother was killed by your father Dada?
> A. Yes.
> Q. Your maternal aunt and Nana told you today to state in the Court that Dada has killed your mother?
> A. Yes.
> Q. Whatever was told to you by your maternal aunt and Nana, you have stated in the Court?
> A. Yes."

. It is quite evident that the child is constantly under tutoring. Once the tutoring is so obvious, the only course available to the Court was to reject evidence of Poornima as an eye witness. The learned Trial Judge followed somewhat queer course. After discussing the reliability of evidence of Bhausaheb (PW 4) and Shantaram (PW 6), the learned Judge has observed that evidence of Poornima, although risky for op acceptance, can be believed by virtue of support by the evidence of PW 4 and PW 6. We are unable to appreciate, much less concur with such a course of assessment of child witness. The evidence of Poornima could not have been accepted even as a supporting piece of evidence if other circumstances pointed a finger of suspicion towards accused. The concluding part of paragraph 23 (reproduced earlier) would rather be more correct approach. The learned Trial Judge has concluded paragraph 23 by observing that even if evidence of Poornima is discarded, other circumstances prove the guilt. After so many admissions, as reproduced hereinabove, that was the only course open to examine whether remaining evidence on record proves the guilt beyond reasonable doubt. After deduction of eye witness

account, as given by Poornima, as unreliable piece of evidence; the case mellows down to a case based on circumstantial evidence.

. We may state here itself that rejection of Poornima's claim to be eye witness has also adverse effect and requires further deduction from the merits of the prosecution case. It is the claim of Bhausaheb (PW 4) that in the morning, he was woken up by Poornima and she told him that "Dada has killed Akka". Finding this deposition of Bhausaheb to be reliable, the Trial Court appears to be believing Poornima to be eye witness. We are of the converse view. If Poornima is not worthy to be of credence as an eye witness because she is constantly tutored, even the deposition of Bhausaheb of Poornima having informed him regarding killing of mother by the father, is required to be doubted.

. We may refer to some more admissions during the course of cross examination, although we may discuss their merit later. Suffice it to say at present that these admissions lend support to claim of the accused that he was not at home. Having elected to take the risk of putting Poornima in the witness box, prosecution can not abort the admissions obtained by the defence

during her cross examination :

> Q. On the night when your mother died, your Dada had gone to Devi?
> A. Yes.
> Q. Your Dada came on the next day in the morning?
> A. Yes. He came when there was siren. Akka served him food, which he threw on her face."

. Merely because Poornima denied the suggestion that father has not killed the mother, learned Trial Judge was convinced that she could be an eye witness. Bare denial of a suggestion can not outweigh the two sets of admissions reproduced hereinabove.

Discovery under section 27 of the Indian Evidence Act :

9. So far as evidence regarding discovery of weapon is concerned, prosecution has tried to bring it on record through deposition of panch witness Sudhakar Pithe (PW 2) and Investigating Officer Balasaheb (PW 10). In fact, prosecution has utilised

services of Sudhakar as multi purpose panch. He was witness to spot panchanama (Exh.13) that was drawn on 5.9.1999 between 9.15 a.m. to 10.00 a.m., arrest of the accused and seizure of his clothes between 15.35 hours to 15.55 hours on the same day and also memorandum and discovery panchanama (Exhs. 15 and 16), which events took place on 7th September 1999 between 17.30 to 17.40 hours and 17.50 to 18.30 hours. The learned Trial Judge has nowhere analysed the reliability of this panch witness Sudhakar. However, Sudhakar has admitted thus during his cross examination :

> "At the time of spot panchanama, the axe was found in the house. It is the same axe before the Court."

. If this admission of Sudhakar is taken into account, it takes away entire credit of the prosecution which claims discovery of blood stained axe at the instance of information given by the accused. Eventually, report of forensic science laboratory (Exh.40) shows that the blade of the axe was stained with human blood of group "B" (which is blood group of victim as well as accused). The evidence of discovery under section 27 of the Evidence Act together with

report of the analysis, certainly enables the prosecution to claim that it has proved the weapon discovered at the instance of the accused, to be the weapon used in the offence and that accused knew the location where the weapon was concealed after commission of offence. As per panchanama (Exh.16), the axe was given out by the accused from the room where waste material was stored and it was hidden in a heap of woods. If admission of Sudhakar quoted above is taken into consideration, this claim of the prosecution stands totally falsified and consequently that makes the prosecution lose the credit which could have been claimed as a cumulative effect of discovery panchanama and report of the laboratory. If the admission of Sudhakar Pithe is considered as acceptable, it will have to be inferred that the culprit dropped the weapon at the location and ran away.

. Regarding credibility of the panch witness Sudhakar, we may refer to his evidence in comparison with the panchanamas which he claims to have witnessed and, therefore, signed. He has admitted in his cross examination that at the time of all three panchanamas, the same police officer was with him. On reference to depositions of A.P.I. Pawar (PW 9) and Dy.S.P.

Balasaheb (PW 10), it is evident that spot panchanama, inquest and arrest panchanama of the accused were drawn by Shri Pawar whereas Balasaheb (PW 10) was the Investigating Officer when the weapon is said to have been discovered at the instance of the accused.

. Even by simple comparison of the timings of panchanamas and the answers about the same by panch Sudhakar, it can be said that Sudhakar does not know as to when which panchanama was drawn. According to answers in paragraph 6 of his evidence for the purpose of arrest of the accused and seizure of his clothes, he was at the police station upto 11.30 a.m. In fact Exh.14 is drawn between 15.35 to 15.55 hours. According to Sudhakar, discovery panchanama was on the next day and he had reached police station at about 9.30 a.m. By the time they reached the residence of the accused, it was about 11 to 11.30 a.m. On reference to Exhs.15 and 16, it is evident that memorandum was registered on 7th September 1999 and not on 6th September 1999 (next day) and the visit to the residence of accused, as per Exh.16, was between 17.50 to 18.30 hours. In the month of September, these are the hours nearing sunset and not morning hours of 11.00 a.m. We feel that the Trial Court ought to have addressed itself to the credibility

of this witness and if the Trial Court was not inclined to do so but was inclined to believe him, then his admission to the effect that the axe was found at the location, totally demolishes the claim of discovery at the instance of the accused.

Regarding motive :

10. Prosecution has relied upon the claim that the accused suspected character of deceased wife and it is tried to deduce by an inference that he, therefore, killed Shaila. It is recorded in the complaint of Bhausaheb as follows :

"_____
_____
_____
_____"

. The motive has come through the evidence of Shantaram (PW 6) in quite a stronger manner. His evidence to this effect has come without any improvement over his police statement. In fact, Shantaram has also narrated an incident of couple of days prior to alleged

incident, to be precise dated 2.9.1999 at about 7.00 a.m. According to Shantaram, on that day, he reached the place of accused because he heard shouts of the deceased and he found that the accused was trying to throttle and kill his wife. Shantaram was accompanied by his wife and the couple intervened and separated the accused and the deceased. According to Shantaram, on that occasion deceased had informed him about husband expressing suspicion against her character and, therefore, having tried to kill her. According to him, at the time of this incident, children including Bhausaheb (PW 4) were present. The First Information Report (Exh.20) is statement of Bhausaheb as recorded by police, according to Bhausaheb at the location itself when police had arrived there. It is pertinent to note that although complaint contains every vernacular narration, as quoted hereinabove, deposition of Bhausaheb is totally silent about the same. In his chief examination, he has nowhere referred to the same. Bhausaheb has narrated the incident couple of days prior to the alleged incident during which his father had tried to throttle his mother. Unfortunately for Bhausaheb, this incident does not find place in the complaint (Exh.20) and it is at the costs of improvement over the first information report. On reference to

cross examination of Shri Pawar (Investigating Officer), Shri Pawar tried to fill in the lacuna by volunteering that this incident was narrated by Bhausaheb during the course of his supplementary statement.

11. In order to make out the case of motive, Shantaram has stretched his version further. The prosecution has also taken the risk of examining father of the deceased i.e. Bhaurao (PW 7), although admittedly his statement was not recorded by police. (Exh.26 paragraph 4). According to Shantaram, deceased had returned to her parents couple of months prior to the incident, on account of ill treatment by the accused such as quarrels and beating. He had gone to bring her back for cohabitation with his brother (accused) and she had returned just 5 - 6 days prior to the incident. She had resumed cohabitation. Although Shantaram does not say in so many words, Bhaurao claimed that both the brothers had come to take Shaila and Shaila was allowed to go with them only after the brothers assured no recurrence of ill treatment. It has come in the evidence of father of deceased that his residence and the residence of accused, although located in different Tahsils of Nasik district, are separated by about 7 to 8 kms. If the wife had returned to parents after being

fed up of ill treatment couple of months prior to the alleged incident and if she was persuaded to return to husband by assurance on the part of husband and his brother about fair treatment, and the incident of throttling is said to have occurred couple of days prior to the alleged incident, it is required to be considered whether wife would not again return to her parents, especially when the place of parents was even within walking distance. If deceased Shaila has not so returned to her parents after throttling incident on 2.9.1999, the only inference possible is that there was no such incident of accused trying to throttle the wife.

. From the absence of allegations regarding father suspecting character of mother, in the evidence of Bhausaheb and from the incident of throttling dated 2.9.1999 coming in his evidence as a result of improvement over the complaint, it must be said that Shantaram is more knowledgeable about rift between the accused and his wife and reasons therefor than Bhausaheb. Bhausaheb is not a child but an adolescent aged about 15 - 16 years. It can not be forgotten that at the material time, the couple had two issues Bhausaheb aged 15 years and Poornima aged 6 years. The allegations that husband used to suspect the character

of wife, are also required to be considered in the light of this family background.

12. It is at this stage that certain admissions on the part of Bhausaheb are required to be taken into consideration which indicate that the two brothers were not maintaining very cordial relations. Bhausaheb admits :

> "It is true that there used to be disputes between my father and uncle relating to agricultural land."

> "The dispute between my father and uncle is that my uncle is demanding his share in the agricultural land and my father is refusing the same."

. It was directly suggested to Shantaram, although the said suggestion is denied by Shantaram, that he is eager to eliminate the accused permanently. It is the claim of accused that five acres land stands in his name in the revenue record and Shantaram desires that the same should be transferred in his name. In the light of this admitted rift between the brothers, we are required

to consider whether Shantaram alone (as claimed by him) could have gone to the father of deceased and persuaded him to send deceased for cohabitation with the accused (Shantaram is partly contradicted by father saying that both brothers together had approached him) and considered in the light of this rift between the brothers, we are required to think whether the details narrated by Shantaram regarding incident of violence between accused and his wife, which are not ably supported by Bhausaheb, are instances of his better knowledge or of more eagerness. On reference to ages, the age of the accused is stated to be 38 years on the date charge was framed and on the date of recording evidence, Shantaram has narrated his age to be 28 years. Accused being the elder brother, it is difficult to accept that Shantaram alone might have gone to Bhaurao Jadhav (PW 7) and persuaded him to send the deceased for resumption of cohabitation with the accused. We may not hesitate to observe that if the incident dated 2.9.1999, as alleged by Shantaram was true, wherein accused tried to throttle the deceased and the incident was witnessed by Shantaram, in all probabilities; Shantaram would have been the first person to reach back the deceased to her father. The incident dated 2.9.1999 deposed to by complainant Bhausaheb and Shantaram and tried to rely

upon by the prosecution for the purpose of establishing the motive is, therefore, required to be received with disbelief.

13. Learned APP Shri Shringarpure, during the course of his arguments, has laid heavy emphasis on two factual details. According to him, as observed by the Trial Court, prosecution has proved two circumstances beyond reasonable doubts i.e. presence of the accused on the night of 4.9.1999 at the residence and the fact that on the next day morning, he was missing and the house was bolted from outside. Learned APP also criticised the replies of the accused as given during the statement under section 313 of the Code of Criminal Procedure, 1973. In the statement, the accused has stated that when he returned home on the next morning after Devi Darshan, he found crowd gathered in front of his house and, therefore, he proceeded to police station where he was arrested. According to learned APP, this is a sign of awareness of the accused of death of his wife inside the house and if such awareness was without entering into the house, the only possible inference is that the accused must be the culprit. The learned APP desired us to draw such an inference because accused did not claim to have entered

the house nor he claimed that upon reaching the police station, he tried to lodge report regarding death of his wife. Firstly, replies by the accused may be or may not be elaborate but both the questions posed by learned APP can be answered on the basis of natural course of human conduct. Can it be ruled out that accused could have enquired somebody in the crowd and having been informed that his son was already taken to police station, he might have proceeded to police station? According to prosecution itself, statement of Bhausaheb was recorded as first information report at 8.10 a.m. It is the claim of Shantaram that he had given intimation about the incident to the police station on telephone at about 6.00 a.m. At Exh.36, there is an entry recorded by Wani Police Station in the station diary indicating that at 6.15 hours, Shantaram had telephonically informed from Lendipura that his brother Vijay (accused) has murdered his wife Shaila at his (accused's) residence. On the fact of this station diary entry as also complaint (Exh.20) on record, can it be believed that the accused saying that he has not killed the wife could have been heard with patience by the police officers?

. Since learned APP has criticised the reply of the accused, we may refer to deposition of Shri Pawar,

the first Investigating Officer as also the panchanama regarding arrest of the accused. Shri Pawar has stated that he arrested the accused under panchanama and at the time of arresting the accused, his Banian and underpant which were stained with blood, were also seized. He deposed so by referring to arrest and seizure panchanama (Exh.14). We have referred to said panchanama. Even the said panchanama does not throw light upon the manner in which accused was apprehended or accosted. It is the claim of the accused that he himself walked into the police station and he was then arrested by police. If the hypothetical circumstances relied upon by the learned APP could suggest guilty conscience of the accused, would his conduct of walking into the police station not suggest his innocence? And in that case, can it be believed that accused would walk into the police station while wearing clothes stained with blood? From the depositions of child witness, Bhausaheb and Shantaram, prosecution has tried to suggest that accused had absconded immediately after the incident. If that be so, could accused have returned on his own and entered the police station with blood stained clothes? When prosecution tried to make out a case suggesting departure of the accused tantamount to absconding, it was necessary for the prosecution to demonstrate the

manner in which accused was apprehended and arrested. Unfortunately, in the evidence of Investigating Officer or the arrest panchanama, there is no material explaining the aspect.

14. The Trial Court has found complainant Bhausaheb to be a reliable and convincing witness. Bhausaheb is son of the deceased. Having lost mother, Trial Court felt that he could not have been persuaded to depose against the father. As a natural course of human conduct, such line of thinking on the part of the Trial Court is fully justified. But in the case at hands, there are instances which suggest that Bhausaheb has been persuaded to depose against the father. Incident that occurred couple of days prior to murder, wherein father is alleged to have tried to throttle the mother, is one such instance. It is deposed by Bhausaheb in paragraph 4 of his chief examination and during his cross examination, he was required to admit that he has no reason to offer why the same does not find place in Exh.20. (In the light of station diary entry at Exh.36, Exh.20 treated as complaint cum first information report, is really required to be treated as statement of Bhausaheb under section 161 of the Code of Criminal Procedure). What Bhausaheb did not depose on

oath from the witness box, finds place in Exh.20 i.e. father having suspicion against the character of mother and, therefore, father ill treating the mother. If Bhausaheb has not so deposed, the first possible inference is that there was no such suspicion, much less quarrels on that count. The mildest possible inference can be that Bhausaheb is unwilling to depose that on oath. In that case, it will have to be presumed that he is persuaded to keep those details on record when Exh.20 was recorded by the police officers. In fact, some doubts are shrouded around Exh.20 as well because according to Bhausaheb, the same was registered at the location itself on arrival of police for the purpose of enquiry whereas according to A.P.I. Pawar, Exh.20 was recorded at the police station itself. Bhausaheb has deposed, as stated in Exh.20 on the point that when he did not feel sleepy, father had asked him that he may not keep awake but he may go to bed. For the purpose, he has deposed that because he was not feeling sleepy, he was reading newspaper. That he was reading newspaper is an improvement over and above the narration of the same part of story, as recorded in Exh.20. Otherwise, all other details are practically identical. Apparently innocent improvement has quite adverse effect on the deposition of Bhausaheb. If he was not feeling sleepy

but still was lying in the bed, the father is most unlikely to question to him as to why he is not going to bed. He would question only when father finds that the son was still not in the bed although it was bed time. That he was reading a newspaper was an essential improvement in order to make the story convincing that on couple of occasions, father suggested the son that it was time for him to go to bed. In fact, that father suggested son to go to bed, that against the usual practice father put off the lights are also circumstances, probably brought on record to show that there was a plan hatching in the mind of the accused. If that be so, why should the accused wait till 5 or 5.30 a.m. on the next morning?

. From the three instances referred from the deposition of Bhausaheb, we could certainly feel that Bhausaheb is amenable to persuasion, nay, on couple of points he has been persuaded to say something. We do not find Bhausaheb to be very truthful and convincing witness, as is felt by the Trial Court.

15. The Trial Court, in order to hold that Bhausaheb and Shantaram are reliable witnesses, has also drawn support from the fact of prompt reporting to the

police station. The Trial Court, for the purpose, has placed reliance upon Exh.20 which is statement of Bhausaheb recorded by police at 8.10 a.m. In fact, as rightly pointed out by learned APP, they received earlier reporting in the form of telephonic message as recorded in the station diary entry (Exh.36). The fact remains that this telephonic message is also by Shantaram (PW 6) and it is the contention of defence that in order to eliminate the accused from the agricultural land, Shantaram is raising accusations against him. In the light of rift between the brothers, as admitted by Bhausaheb, we are not inclined to draw support from the prompt reporting, as is done by the Trial Court.

16. The other circumstance and quite a considerably strong circumstance relied upon by the Trial Court as also by the learned APP while arguing before us, is the fact that entrance door of the house of the accused was bolted from outside when children gave a call to uncle Shantaram and his wife. On this count, we may say that this is the version of Shantaram alone. Shantaram has so deposed in paragraph 3 of his chief examination and on that count, he is not contradicted with his statement as recorded by the police. We, therefore, believe that Shantaram is

consistent on that aspect before the police as well as while in witness box. According to Shantaram, he found the house bolted when he rushed there upon hearing shouts of the children, "_____". On reference to deposition of Bhausaheb, he only states that, "I started shouting and then my uncle and aunt came there". Bhausaheb does not make any reference as to whether the door was closed or whether it was bolted from outside or whether it was opened by uncle Shantaram. On reference to Exh.20, it is recited, "_____" and thus it does specifically say that the door was latched or bolted from outside. But Poornima while saying, "My maternal aunt's husband Nana opened the door", does not say anything about the door being latched from outside. As a natural course of human conduct, if the door was latched or bolted from outside, it would have been specific deposition of the children that upon seeing the death of mother and being frightened, they tried to go out of house and found that they could not open the door because it was bolted from outside. No such details are on record in the deposition of either of the two children who are said to be inside the house when accused departed after committing alleged murder. The deposition of Shantaram to that effect, therefore, ought not to have been taken by learned Trial Judge as whole

the truth in absence of requisite support from the children to such version that the entrance door of the house was bolted from outside.

. Taking over all view of the evidence of Bhausaheb and Shantaram, we are not convinced that Exh.20 or deposition of Bhausaheb has come without anybody influencing him as to what should be reported to police and what should be deposed from the witness box. We do not find them to be witnesses who can be relied without risk and to that extent, we differ with the findings of the Trial Court.

17. In the concluding part of the judgment, learned Trial Judge has drawn support from circumstantial evidence to the depositions of Bhausaheb and Shantaram and since the depositions are convincing with such support, the Trial Judge was inclined even to believe Poornima as truthful eye witness, may be as a supporting piece of evidence.

. In paragraph 25, learned Trial Judge has referred to the challenge of the defence to discovery under section 27 of the Indian Evidence Act in the light of admission by panch witness that the axe was seen at

the location when spot panchanama was drawn. The Judge has tried to explain it by very weak reason that this may be a off hand admission. The learned Trial Judge has accepted that under panchanama (Exh.14) blood stained underwear and underpants, which are reported to be having washed blood stains by the C.A. report. We have already commented about veracity of the panch witness Sudhakar. So far as the recovery of blood stained clothes from the person of the accused is concerned, we may refer to one more statement from the deposition of Sudhakar. In paragraph 6, he admits :

> "The underpant and Banian in wet condition (were in wet condition) when they were seized. The shirt was also wet. They were lying in the police station."

This contradicts with the panchanama that the shirt and pant of the accused were not stained but only after removal of the shirt and pant, it could be detected that the underwear and underpant were stained with human blood.

18. The learned Trial Judge has summed up assessment and evaluation of the evidence in paragraph

33 of the judgment. But for the reasons discussed hereinabove, we may say that we are not inclined to believe Poornima to be genuine eye witness. It can not be ruled out that she is tutored. We must say that the evidence regarding discovery of weapon at the instance of accused, because of admission of panch witness Sudhakar as also the calibre of evidence rendered by him, is not proved beyond doubts. So far as the motive is concerned, we must record that prosecution has failed to establish the same in convincing manner. On the contrary, attempt on the part of prosecution to establish the motive through depositions of Shantaram and Bhausaheb has given rise to a suspicion in our mind that probably Shantaram has shown some enthusiasm to make out the case of motive and for that purpose, even Bhausaheb appears to be persuaded. Taking into consideration the assessment of evidence of Bhausaheb and Shantaram, we do not feel that the two circumstances strongly relied upon by learned APP, can be said to have been established beyond reasonable doubts by evidence of these two prosecution witnesses i.e. presence of accused at the residence on that night and the door being bolted from outside when Shantaram reached there upon hearing shouts of the children. The prosecution has not been able to be consistent in saying that

accused had absconded, by its failure to demonstrate the efforts required to arrest the accused. Recovery of blood stained clothes from the person of accused, because of calibre of evidence of Sudhakar is also not established in a satisfactory manner. We must, therefore, say that if the evidence of Poornima is ignored because she is tutored, the case which drifted to the status of a case based on circumstantial evidence, can not be said to have been proved beyond reasonable doubts by convincingly establishing the chain of circumstances with the aid of cogent evidence, leaving no margin for any other hypothesis except the guilt of the accused.

. Coming back to the admissions of Poornima reproduced by us in the earlier part of this judgment, Poornima has admitted that on the night her mother was killed, her father had gone for Devi Darshan. She states that he had returned on the next morning after the siren. Although learned APP tried to point out that this admission obtained from Poornima is not in perfect harmony with the statement of accused under section 313 of the Code, we must remind ourselves that the defence does not shoulder any burden of proof. Accused, who impliedly pleaded alibi, can not be called upon to

establish the same unless prosecution stands on its own legs.

19. Admittedly, accused had collected an amount of Rs.100/- from employer of Bhausaheb (PW 4) on 4.9.1999 at 5.00 p.m., saying that the sum was required by him for going to Devi Darshan.

. To counter this, learned APP has drawn our attention to the fact that Bhausaheb has deposed of parents and sisters taking dinner when he returned home at 8.00 p.m. and he desires us to believe this statement of Bhausaheb for drawing an inference that accused had not proceeded for Devi Darshan but was at home on the alleged night. In this context, we may point out that according to Shantaram, even on 4.9.1999 at 8.00 p.m. there was a quarrel going on between deceased and the accused but he and his wife did not pay much attention to it. When we refer to deposition of Bhausaheb, there is no reference to this incident. This incident is also not referred in the statement (Exh.20). This is inspite of the fact that it is the claim of Bhausaheb that he returned home at 8.00 p.m. This can be said to be one more incident where Shantaram knows more details than Bhausaheb himself and narration of the

quarrel between accused and wife is probably aimed at further confirming presence of accused at the residence on the night of 4.9.1999.

. Having balanced the evidence supporting the prosecution case as also causing adverse effects upon the prosecution story in the light of material available on record, as also on the touchstones of probability and natural course of human conduct, the same does not inspire confidence to believe the story, as tried to be made out by the prosecution. The argument of learned Advocate Shri Kocharekar that probably prosecution has reached the stage "May be" but has not reached the stage "Must be", is required to be upheld which should entitle the accused for benefit of doubt. We are, therefore, inclined to allow the appeal.

20. The appeal is allowed. The judgment and order dated 23.2.2001 delivered by 3rd Additional Sessions Judge, Nasik in Sessions Case No. 2 of 2000 thereby holding appellant Vijay Yaman Korde guilty of offence punishable under section 302 of the Indian Penal Code and sentencing him to life imprisonment and fine, is quashed and set aside. He is acquitted of the charge. He shall be set at liberty forthwith, if not

required in any other case. Fine amount, if is deposited, shall be refunded to the appellant accused.

. Advocate Shri Kocharekar was appointed to prosecute the appeal for the prisoner at the costs of the State. We quantify his professional charges at Rs.2,500/-.

(SMT.V.K.TAHILRAMANI,J.) (N.V.DABHOLKAR,J.)

January 19,2006.

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